

Before the
Federal Communications Commission
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of

Amendment of the
Commission's Rules
Regarding Multiple
Address Systems

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WT Docket No. 97-81

To: The Commission

REPLY COMMENTS

Thomas Domencich, Paula J. Malone, George L. Schrenk, and Dennis Sheahan (collectively, the "MAS Applicants"), by their attorneys, hereby submit their reply to the Comments filed in response to the Notice of Proposed Rulemaking (the "NPRM"), FCC 97-58, released February 27, 1997, in the above-captioned proceeding.^{1/} The following is respectfully shown:

**I. The Commission Is Bound by the Act
and Its Prior Decisions to
Conduct a Lottery of the Pending MAS Applications**

1. The MAS Applicants fully support the view, expressed by a majority of commenters in this proceeding, including a large number of other MAS applicants, that the licensing procedures in place at the time the pending MAS applications were filed with the Commission must be used to process those

^{1/} Each of the MAS Applicants filed applications within the January 1992 filing windows for Private Operational Fixed Service licenses in the 932-932.5/941-941.5 MHz frequency bands. Consequently, each of the MAS Applicants has a direct interest in the issues under consideration in this proceeding.

applications and grant licenses.^{2/} Following this course will result in prompt and efficient issuance of MAS licenses and the initiation of service on the spectrum. In the process, the Commission will comply with Congressional intent and will confirm that it takes seriously its obligation to treat all applicants fairly.

2. Because the pending MAS applications were filed more than one year before Congress granted the Commission authority to conduct auctions, they are subject to the "Special Rule" enacted by Congress^{3/} simultaneously with the grant of auction authority in Section 309(j) of the Communications Act of 1934, as amended.^{4/} Congress was acutely aware of the inequities that might result from retroactively applying the Commission's new auction authority to pending applications, and both the statute and its legislative history evidence Congress's intent that applications that were pending at the time of passage of the auction statute should not be subject to Section 309(j).^{5/}

3. Conducting a lottery for the pending MAS applications also is consistent with the Commission's treatment of similarly situated applicants. On

^{2/} See, e.g., Comments of Alarm Industry Communications Committee; Data Address Systems Partnership; Coalition for Equitable MAS Licensing; Fisher Wayland Cooper Leader & Zaragoza L.L.P.; AirTouch Paging and Arch Communications Group; JMP Telecom Systems, Inc.; Geoffrey D. Commons; Mind Communications.

^{3/} 1993 Budget Act, § 6002(e) (Special Rule), 107 Stat. 312, 397 (1993).

^{4/} 47 U.S.C. § 309(j).

^{5/} See H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 498 (1993); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Memorandum Opinion and Order, 9 FCC Rcd 7387 (1994), at paras. 10, 13.

three prior occasions^{6/} the Commission confirmed that applications filed prior to July 26, 1993 would be disposed of by lottery,^{7/} in accordance with the Special Rule, because "Congress ultimately decided that other factors, including considerations of equity and administrative cost and efficiency, justified the use of lotteries for those applicants who, in reliance on the Commission's existing lottery procedures, had filed applications prior to July 26th," 1993.^{8/}

4. The Commission's earlier rulings with respect to applications filed prior to July 26, 1993 apply with equal force to the MAS applications. Although the Commission now claims that "subjecting these applications to a lottery process would be time-consuming and complex,"^{9/} this contradicts the Commission's earlier statement that holding a lottery for the same applications was "administrative[ly] convenient[t]" and would "facilitate the overall licensing process."^{10/} As several commenters note, the Commission already has prepared a lottery notice and can

^{6/} Of course, as discussed below, the Commission also previously concluded that it would hold a lottery for the MAS applications.

^{7/} Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, Report and Order, 10 FCC Rcd 9589 (1995), at para. 92; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Memorandum Opinion and Order, 9 FCC Rcd 7387 (1994), at paras. 10, 17; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Notice of Proposed Rule Making, 8 FCC Rcd 7365 (1993), at n.150.

^{8/} 9 FCC Rcd 7387 at para. 13.

^{9/} NPRM, para. 51.

^{10/} Public Notice, 6 FCC Rcd 7242, 7244 (1991).

proceed with a lottery quickly.^{11/} Tellingly, the Commission has not supported its conclusion that an auction would be more administratively convenient by providing any substantive evidence in the record.^{12/}

5. Notably, the issue of the disposition of the pending MAS applications was addressed and resolved on an earlier occasion. In April 1994, the Commission "found the principal use of MAS to be for private service," and stated "[w]e will ... lottery the [pending] applications" that were filed prior to July 26, 1993.^{13/} But the Commission did not lottery the applications; instead, without explanation, it delayed action for more than three years. Now, the Commission claims to have conducted an off-the-record, "preliminary" review of the pending MAS applications and concludes that they "seemingly propos[e]" subscriber-based service that would make them subject to the Commission's authority to conduct auctions under Section 309(j) of the Communications Act of 1934, as amended.^{14/}

^{11/} See Comments of Fisher Wayland Cooper Leader & Zaragoza L.L.P. at 8; AirTouch Paging and Arch Communications Group at 6.

^{12/} While it is true that a lottery would require Commission resources, the conclusion that "during a comparable period of time, an auction ... could be completed," NPRM at para. 51, simply is not credible, based upon a review of the Commission's record to date of adopting auction procedures and conducting auctions. Virtually all of the steps necessary to complete the lottery already have occurred. The record indicates that MAS licenses in fact could be issued much more quickly by lottery than by auction. See, e.g., Comments of Fisher Wayland Cooper Leader & Zaragoza L.L.P. at 8.

^{13/} In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348 (1994), at para. 35 & n.25.

^{14/} NPRM, para. 7.

6. The MAS Applicants concur with the commenters that the record does not support the Commission's conclusion.^{15/} Indeed, according to one commenter, a review of the MAS applications may have been impossible because they were lost over two years ago.^{16/} In this regard, as Data Address Systems Partnership correctly argues, the Commission has an incentive to "predict" the development of subscriber-based services to support its case for auctions; that appears to be the case here. But, the Commission expressly advised applicants prior to filing that "MAS channels are not suitable for providing a communications service to a large sector of the general public.... Instead, potential users ... are limited to various types of businesses with specialized communications needs, generally internal to those businesses."^{17/} The comments rebut the Commission's predictions and reflect substantial continued interest by the applicants and others^{18/} in offering the services applied for.

II. The Commission May Not Dismiss the Pending MAS Applications

7. The Commission's tentative conclusion that it has authority to dismiss the pending applications^{19/} ignores the fact that Congress did not give the

^{15/} Comments of Alarm Industry Communications Committee at 9-10; Coalition for Equitable MAS Licensing at 4; Data Address Systems Partnership at 5.

^{16/} See Comments of Coalition for Equitable MAS Licensing at n.10.

^{17/} Public Notice, 6 FCC Rcd at 7243 (emphasis by Commission).

^{18/} See, e.g., Comments of Data Address Systems Partnership; GTECH Corporation; Black & Associates; ProNet, Inc.

^{19/} NPRM, para. 52.

Commission authority to do so, and that dismissals would work a retroactive harm to the applicants of precisely the kind proscribed by the Supreme Court.^{20/} In Landgraf, the Court said that "[i]f the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result."^{21/} Here, the Commission seeks to have its auction authority operate retroactively by dismissing applications in order to hold an auction to issue licenses for the very spectrum already applied for. Congress provided no authority for such an action. To the contrary, Congress specifically enacted the Special Rule to reflect its intent that pending applications remain subject to lottery procedures.^{22/}

^{20/} See Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994).

^{21/} Id. at 1505.

^{22/} In this respect, the MAS Applicants agree with the Alarm Industry Communications Committee ("AICC") that the Commission lacks authority to dismiss the pending applications. According to AICC, the Commission could, however, hold an auction among the 50,000 pending applicants. Comments of AICC at 6. The MAS Applicants believe that the purported burdens of a lottery would pale beside the burdens of conducting an auction among the same applicants.

III. Conclusion

8. It appears that the Commission is attempting to reach the result it wants -- auctions -- at the expense of administrative due process, good faith, and fair dealing. Stating that auctions are favorable because they will not result in service delays, that the MAS applicants were free to seek other spectrum while their applications were pending, and that auctions will allow the government to realize value for the spectrum,^{23/} simply ignores reality. The Commission already decided the issue and told the applicants years ago that it would conduct a lottery under its existing rules. And, the notion that all spectrum is interchangeable is belied by market realities, as evidenced by the outcome of the recent Wireless Communications Services auction. Finally, as numerous commenters point out,^{24/} the government collected nearly \$8 million in application fees, which have been generating interest for five years, so substantial value already has been returned to the government. The narrow view that auctions serve the public interest under any circumstances and without regard to other considerations, should be abandoned.

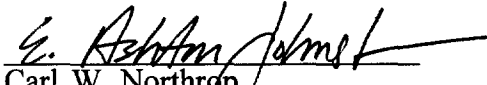
^{23/} NPRM, paras. 55-58.

^{24/} See, e.g., Comments of Data Address Systems Partnership at 7; Fisher Wayland Cooper Leader & Zaragoza L.L.P. at 10-11.

WHEREFORE, the foregoing premises duly considered, the MAS Applicants respectfully request that the Commission promptly conduct a lottery to award licenses for pending MAS applications.

Respectfully submitted,

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May 16, 1997

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CERTIFICATE OF SERVICE

I, Sharon L. Henry, a secretary with the law firm of Paul, Hastings, Janofsky & Walker LLP hereby certify that I have on this 16th day of May, 1997, caused a true and correct copy of the foregoing Reply Comments to be sent by first-class United States mail, postage prepaid, to the following:

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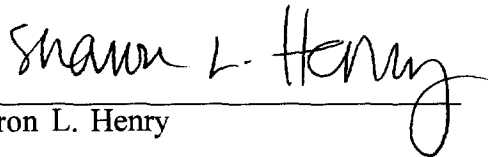
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